



When Retributivism Triumphs: Challenges to the Human Rights of Prisoners in Cebu, Philippines

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This work is dedicated to the prisoners whose individual tales gave substance to this work. Here's to hoping this will be the beginning of a dawning realization that their obscured pains and sorrows are but a product of a punitive culture that tramples their rights and dignity.

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List of Acronyms

BJMP	Bureau of Jail Management and Penology
Balay	Balay Rehabilitation Center
BuCor	Bureau of Corrections
CAPA	Cebu Archdiocesan Prison Apostolate
CAT	Committee Against Torture
CHR	Commission on Human Rights
DILG	Department of Interior and Local Government
DOJ	Department of Justice
HRC	Human Rights Commission
ICCPR	International Covenant on Civil and Political Rights
ICPS	International Centre for Prison Studies
MAG	Medical Action Group
PAO	Public Attorneys' Office
PC/INP	Philippine Constabulary/Integrated National Police
SMR	Standard Minimum Rules for the Treatment of Prisoners
UDHR	Universal Declaration on Human Rights
UNCAT	United Nations Convention Against Torture

Abstract

Why are international human rights norms plagued with the problem of huge gap between the promise of formal rights and the harsh realities that people they are supposed to protect experience on the ground? In answering the question, this paper investigates the right-reality divide of the human right of prisoners against cruel, inhuman, or degrading punishment or treatment. Using socio-legal approach in understanding laws as not existing in a vacuum and therefore not insulated from the socio-cultural and political economic structures of society, this paper argues that the rift between right and reality in the case of the human right of prisoners against cruel, inhuman or degrading punishment or treatment is due to the lack of full acceptance of this right by society. In conclusion, this paper posits that the non-acceptance of this right is caused by the dominance of the retributive perspective of punishment in society over the rehabilitative ideal set by human rights norms, leading to the non-recognition and non-promotion of this right on the ground.

Relevance to Development Studies

Prisons are telltale signs of the degree of civilization a country has achieved, hence the emphasis given to humane conditions of imprisonment no less than by the United Nations. The study of prisoners' rights is highly relevant to development studies because human rights for all is a constituent and integral element of genuine development. This study is undertaken to draw public attention to the neglected issue of prisoners' rights violations in the hope that it will become part of public discussions and eventually making it an area of concern for government. Its relevance is in the contribution it will make to formulating development policies where no one is left behind, even the prisoners, for the ends of development is the improvement and well-being of the entire population and all individuals, without discrimination.

Keywords

'Cruel, inhuman, or degrading punishment or treatment', Socio-legal Approach, Sociology of Punishment, Retributivism, Utilitarianism,

Chapter 1

Introduction

Prisoners' rights are arguably the most neglected and oft-forgotten rights. As Easton (2011:241), describing the prison systems in the more advanced countries of the United States and United Kingdom, puts it:

The paradox of the prisoner is that inside the modern prison or panopticon he or she is subjected to high levels of surveillance and observation, but outside achieves a high level of invisibility. Prisoners are isolated, cut off from society, physically and socially excluded and marginalized, and on the fringes of the polity to the extent that politicians perceive concessions to prisoners as politically damaging.

Such statement also speaks a whole lot of truth about Philippine prisons. Issues of abuse and dire conditions in prisons are not a huge concern to society, especially in poor countries where life outside prison is as desperate as life inside it. The public, wary about security and protection, believes that locking people up is the only way to protect society from these criminals, unconcerned about what is going on inside the prisons.

Owing perhaps to the unpopularity of such a cause, there is a dearth of literature that deals comprehensively on prisoners' rights in the Philippines. Issues as to what practices constitute violations of prisoners' rights, and how and why these violations are widespread take a backseat compared to what many considered the more pressing concerns of environmental degradation, gender inequality, or child abuse. This study is being carried out to draw attention and raise awareness to this neglected issue of violations of prisoners' rights and to make it a part of public concern. This is a step towards opening up debates and discussions and ultimately shedding light on the underlying reason for the violations of prisoners' rights.

While under international laws embodied in the International Covenant on Civil and Political Rights (hereinafter, ICCPR), the United Nations Convention Against Torture (hereinafter, UNCAT), and the Universal Declaration on Human Rights (hereinafter, UDHR), the latter considered to have gained formal legal force as part of customary international law (Steiner et al. 2008: 137), and domestic laws Filipino prisoners are guaranteed of their basic human rights, reports of rights violations in the Philippine prisons are widespread and are a serious cause for concern.

It became apparent when in 2008 the Philippines submitted its consolidated 2nd-5th state report covering the period 1989-2007 to the United Nations Committee Against Torture (hereinafter, CAT), a report which received much criticisms from the same United Nations (hereinafter, UN) body. This report came after the initial report was submitted in 1988, exactly twenty years since the immediately preceding one was submitted, highlighting the meager attention given to prisoners' rights by the state. The state report mentioned that the Philippines has always been conscious of its duty to respect, fulfill and protect

the rights of its citizens (UN Committee Against Torture 2008). More particularly, the Philippine report asserted that it has not been remised with its treaty obligations, and enumerated several laws, rules and regulations legislated and adopted to give effect to the UNCAT.

However, a joint civil society report released earlier covering the same reporting period and presented to the CAT in the same year contradicted the Philippine government's claim. The civil society report depicted a grim picture of Philippine prisons, where human rights of prisoners are constantly violated. In sum, the report said that: 'torture of detainees and prisoners and ill-treatment of marginalized sectors such as women and children prisoners remained unabated' (Joint Civil Society Report on Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment 2008: 3).

Furthermore, figures released by the International Center for Prison Studies (hereinafter, ICPS) revealed that Philippine jails and prisons which have an official capacity for 35,000 persons, are 300% over their capacity holding close to 105,000 inmates by mid-2011. Out of this figure, a huge majority (65%) are remand prisoners (International Centre for Prison Studies 2011).

In addition, in 2011 the US State Department released a report on human rights practices in the Philippines, which enumerated widespread violations of prisoners' rights, including torture and other physical abuse of prisoners, sexual abuse, harsh physical conditions of prisons and alarming number of deaths caused by communicable diseases (US Department of State Human Rights Country Report 2010).

Giving more credence to the civil society report over the state report, in its 2009 concluding observations the CAT said that torture and other cruel, degrading or inhuman treatment or punishment are still widespread. The CAT added that severe overcrowding, use of sub-standard facilities, inadequate food and medical attention, and denial of prison inspections by independent monitoring bodies remain unaddressed by the government (UN Committee Against Torture 2009).

That the Philippines failed to comply with its international obligations is obvious. Many legal scholars argue that failure of states to enforce international human rights norms is due to the lack of powerful compliance mechanism in the field of human rights. This view has been shared by Okafor, Mutua, and Watson (Okafor 2007: 1, 41), Hathaway (2002) as and David Barnizer (2001: 1). All argue that human rights norms are not enforced because no state is afraid of the possibility of sanctions as human rights monitoring bodies are inherently weak.

I will argue that this weak compliance mechanism of human rights norms, while I do not claim it to be unseemly, tends to be too legalistic and may not be the sole determinant for compliance. First, lack of a powerful compliance mechanism can explain very little why some state parties perform their international human rights obligations better than other state parties. Second, why would ordinary criminal laws like homicide or theft for example are always enforced and their violations often bring sanctions against violators, compared to human rights laws, when there is no international criminal monitoring body that police states to enforce ordinary criminal laws to begin with?

Forsythe (2009) sees the need of a broader perspective in examining the failure of states to comply with their human rights obligations. This points us to explanations given by socio-legal theorists. Merry (2006a: 231), Fortman (2006), Khan (2009: 202-221) and Banakar and Travers (2005) argue that human rights laws are not insulated from the socio-cultural and political economic environment, and it will be helpful to examine against this backdrop the reason why they are not implemented.

The above premises considered, this paper takes on socio-legal approach to investigate the non-implementation of the human right of prisoners' against cruel, inhuman, or degrading punishment or treatment and argues that the lack of full acceptance by society of this right is a crucial factor for its non-implementation and non-enforcement enforcement on the ground.

With research data that mirrors the findings of the 2009 CAT concluding observations and shows the dominance of the retributivist perspective of punishment, I will argue that the rift between prisoners' rights in the books and prisoners' rights as practiced is deeply rooted in the triumph of retributivism over the rehabilitative ideal of punishment set by international human rights norms, the reason why society is non-receptive to these rights.

1.1 Research Questions

The core question that serves as a guide for this research paper is:

To what extent do the international human rights norms and the dominant retributivist perspective of punishment shape the situation of the human right of prisoners against cruel, inhuman, or degrading punishment or treatment in the jail facilities of Cebu City, Mandaue City, and Lapu-lapu City?

More specifically, the following sub-questions also apply:

- 1.) What is the significance of the international human rights norms in the promotion of the human right of prisoners against cruel, inhuman, or degrading punishment or treatment?
- 2.) How does the dominant retributivist perspective of punishment affect the promotion of the human right of prisoners against cruel, inhuman or degrading punishment or treatment, especially in terms of implementation of rehabilitative measures in prison?

1.2 Methodology and Sources of Data

In investigating why the Philippines fares poorly in enforcing the international human rights norms for humane treatment of prisoners and to answer the research questions above, with the city jail facilities of Cebu City, Mandaue City, and Lapu-lapu City – being the three biggest cities of Cebu province – as units of analysis, this paper draws on socio-legal theories, concepts, and approaches. As Landman (2009: 19) puts it: 'the social sciences have problematized human

rights in ways that have challenged the predominance of law and opened up new avenues of inquiry that provide greater insight into the fundamental challenges that need to be overcome for a truly global implementation of human rights norms'.

The socio-legal approach will be linked with the utilitarian versus retributivist goals of punishment and Garland's (1990) argument that punishment should be seen as a combination of strategy for control espoused by Foucault and an expression of social sentiment espoused by Durkheim, in order to afford a more nuanced explanation why despite the presence of the supposedly normative function of the international human rights laws which are further incorporated in the constitution and laws in the Philippines, reports abound suggesting widespread violations of prisoners' right to humane treatment.

The term 'international human rights norms' is meant the international human rights laws and resolutions that states are bound to implement and enforce. References will be made to the ICCPR, UNCAT, and UDHR as they specifically contain provisions on the promotion and protection of the human right of prisoners against cruel, inhuman, or degrading punishment or treatment as well as to the various UN resolutions providing guidelines for the humane treatment of prisoners. They set the standards on what constitute cruel, inhuman, or degrading punishment or treatment which will be made the basis for assessment in this study.

This paper employs qualitative research to answer the research questions. It relies both on primary and secondary data. The data gathering is done by way of interviews, observation and documentary analysis.

In total, I have observed the conditions of all three jail facilities, both the male and female dormitories of each. I have interviewed 5 wardens, 2 wardens (male and female dormitory) for each jail facility, except in the Mandaue City Jail whose warden for the female dormitory is due for transfer, and a total of 15 inmates, 13 of whom are remand prisoners, and 2 are serving sentence. 6 of the 15 inmates-respondents are from the Cebu City Jail, while there are 4 inmates-respondents from the Mandaue City Jail and 5 from the Lapu-lapu City Jail.

To be granted access to all three jail facilities is a long and tedious process. I had to secure the endorsement of the Commission on Human Rights (hereinafter, CHR) for the Bureau of Jail Management and Penology (hereinafter, BJMP) regional director of Central Visayas, in which Cebu is a part of, to issue a letter of authority addressed to the jail wardens for me to be allowed entry and granted interviews. While the endorsement from the CHR was given immediately, it took me a week's wait before I was finally given the authority by the BJMP director. Though already armed with the letter of authority the first time I visited the jail facilities, I was not able to conduct the interview right then and there. The interviews were scheduled several days later because the jail authorities had to find a free time convenient for both the inmates and the wardens that I was going to interview. The inmate-interviewees were pre-selected by the jail authorities.

I conducted the interviews with the inmates in Cebuano, the local language. I explained to them that the purpose of the interview is strictly academic. When asked if they preferred anonymity, 13 of the 15 inmates-respondents desired it, '*just to be safe*', they said. Two inmates said that it was all up to me.

For reasons of prudence, all prisoners and wardens interviewed shall remain anonymous.

I also interviewed a staff member of the Cebu Archdiocesan Prison Apostolate (hereinafter, CAPA), the prison ministry arm of the Catholic Church in Cebu. I interviewed as well an attorney from the CHR, a staff member of Karapatan, a non-government organization (NGO) whose one advocacy is on political prisoners, and two lawyers from the Public Attorneys' Office (hereinafter, PAO) of Cebu. In order to avoid potential harm, they too shall remain anonymous.

The real identities of persons mentioned in this paper as well as other records kept in anonymity are in file with the author.

1.3 Scope and Limitations

This paper focuses on the jail facilities of Cebu City, Mandaue City, and Lapu-lapu City. They are chosen as the units of analysis of this study because even though only anecdotal evidence suggests violations of the prisoners' human right against cruel, inhuman, or degrading punishment or treatment in these facilities, as a human rights lawyer in Cebu, I have heard of stories about widespread prison abuses and violations of prisoners' rights. I have also personally witnessed the pitiful conditions of these jail facilities as well as heard from the news and word-of-mouth information from family, friends, colleagues and acquaintances of abuses and violations.

These jail facilities are directly under the jurisdiction of the BJMP. It is important to emphasize this considering that there are other detention centers under the jurisdiction of the Bureau of Corrections (hereinafter, Bucor). These detention centers under Bucor's jurisdiction, technically referred to as 'prisons', are strictly for convicted inmates serving more than three years imprisonment; while the detention centers technically referred to as 'jails' are for inmates awaiting trial and convicts serving less than three years imprisonment and may be under the BJMP, or the office of the governor in cases provincial jails. The Bucor is under the supervision and control of the Department of Justice (hereinafter, DOJ), while the BJMP and the office of the governor is under the Department of Interior and Local Government (hereinafter, DILG).

Due to differing circumstances, findings and conclusions of this paper are confined to these BJMP-supervised detention centers only. Whether the findings and conclusions of this study reflect the broader realities of Philippine prison systems in general is a good subject of further research.

One limitation of this study is that access to information from the government was a challenge, not only because government data are scattered and not systematic, but more so because my inquiries touched on sensitive issues and were unwelcome. The reason I had to secure endorsements from our human rights body and some private organizations with friendly relations to relevant government agencies for access. But even that is not enough to be given real free access to sensitive information.

Another limitation of this research is that I had no free hand in selecting my respondents. And although there was privacy during these interviews, they being conducted with one prisoner at a time where I and the inmate-

respondent were left alone in a room, there were occasional interruptions during these interviews as jail personnel would just barge in asking how was the interview going. Although this is with the exception of Jail A, both male and female dormitories.

In order to address these limitations, I have gathered information from other sources and data cross-referencing. Much of the secondary data in this paper are sourced through the internet such as government and NGO websites. Media and academic websites also provided some data. Interviews were not limited to the inmates and prison officials only, but also extended to other persons involved in prison works. These were done for purposes of ensuring that all the data relied upon are verified and credible.

1.4 Structure of the Paper

This paper is organized into five chapters. The research topic is introduced in Chapter 1. The chapter also deals with scope and limitations of this research as well as methodology. Chapter 2 tackles the interface between international human rights norms and sociology of punishment in answering the core question of this study, leading to my framework of analysis. In Chapter 3, I will present the Philippine context by providing the country's prison system and how it is affected by the interface between human rights norms and sociology of punishment. Chapter 4 deals with research findings and the analysis which will be presented by themes. Chapter 5 summarizes the results and brings back the research questions which will be answered based on what the research data suggests.

Chapter 2

Investigating the Right-Reality Divide

In this chapter, the strengths and weaknesses of the international human rights norms in responding to human rights violations will be examined using socio-legal approach and the sociology of punishment as analytic lenses. A combination of these two theories will be used to identify, explain and analyse the causes of the right-reality divide specifically of the human right of prisoners against cruel, inhuman, or degrading punishment or treatment. For purposes of clearer understanding on what comes within the purview of this particular right, I will set out here what is meant by 'cruel, inhuman, or degrading' punishment or treatment by referencing to standards laid down by the international human rights norms.

2.1 Right-Reality Divide and Effectiveness of Human Rights Norms

There are legal scholars who argue that international human rights norms can be standard-setting, can influence domestic policy framework, inform judicial decisions, and can be used in monitoring human rights performance of countries.

Ignatieff (1999: 10) said in what he termed as 'juridical revolution' that because most modern states have ratified the international human rights conventions and incorporated these conventions in their constitutions and laws, they are now compelled to comply with their obligations. In addition to that, because of the emergence of 'advocacy revolution', states are pressured to fulfill their obligations (*ibid.*) Ignatieff asserted further that more than naming and shaming governments, the international human rights monitoring bodies have now, in what he termed as 'enforcement revolution', devised ways to punish violators, citing as example the international tribunals in The Hague and Arusha as having secured the first convictions under the 1948 Genocide Convention (*Ibid.*: 11).

Critics, on the other hand, claim that the international human rights norms are very weak at commanding obedience and have very little success in making states comply its obligations (Okafor 2007: 1). International legal scholars such as Makau Mutua and Shand Watson opine that the international regime of human rights is basically weak and lacks effective enforcement (*Ibid.*: 41). David Barnhizer likewise asserts that the international human rights is not working as an effective system because no one or no state is afraid of the possibility of sanctions (Barnhizer 2001: 1).

Further, Joseph and Kyriakis (2010) said that the greatest achievements of international human rights norms lie in, first: the normative arena, it sets standards by way of creation of treaties that generate impressive and important human rights jurisprudence; second: it is instrumental in the mainstreaming of human rights into international and national institutions. This notwithstanding, international human rights norms, in general, utterly failed to change the behavior of human rights abusers, either by states or non-state actors (*Ibid.*).

Considering the failure of international human rights norms to actually bridge the gap between formal rights and rights as practiced, it is not hard to agree with the critics that human rights laws are weak because, in and by themselves, they cannot address the abuses and violations of rights. Indeed, while human rights norms in principle are standard-setting, this does not translate to having a meaningful and real impact to people. I agree with the assertion that one of the biggest problems of human rights is the huge gap between the promise of formal rights proclaimed by international human rights instruments and the cruel realities that the people they are supposed to protect have to endure (Carey et al., 2010: 12). This is echoed by Irene Khan (2009: 202) when, speaking about the failure of international human rights law to end poverty, she lamented that while human rights are guaranteed by international laws, they rarely provide the whole solution for human rights violations.

The Philippine experience in the area of the human right of prisoners against cruel, inhuman, degrading treatment or punishment supports this truth.

2.2 International Human Rights Norms: Experience in Philippine Prisons

Article 5 of the UDHR prohibits torture and other forms of cruel, inhuman or degrading treatment or punishment. The ICCPR, adopted by the UN in 1966 and entered into force in 1976, its Article 7 likewise prohibits torture, cruel, inhuman, or degrading punishment or treatment. Article 10 provides that persons deprived of liberty shall be treated with dignity and respect and mandates that the penitentiary systems should aim for the reformation and rehabilitation of prisoners. The UNCAT, adopted in 1984 and entered into force in 1987, specifically defines what is torture and calls for its universal prohibition, and at the same time mandates states parties to adopt national legislations against torture and other cruel, inhuman, or degrading punishment or treatment.

The Philippines is a state party to these treaties which have the force and effect of binding international laws. It has ratified the UNCAT in June 1986 and the ICCPR in October 1986 (United Nations Office of the High Commissioner for Human Rights 2012).

The Philippines is likewise signatory to important UN declarations providing guidelines for humane treatment of persons in detention. These are the Standard Minimum Rules For The Treatment Of Prisoners (hereinafter, SMR), the 1988 General Assembly Resolution of the Body Of Principles For The Protection Of All Persons Under Any Form Of Detention Or Imprisonment, and the 1990 General Assembly Resolution of the Basic Principles For The Treatment Of Prisoners. Although these resolutions are not binding, they are issued as guidelines for the humane treatment of prisoners or detainees.

In April 2012, the Philippines signed and ratified the Optional Protocol of the UNCAT (Ibid.) which calls for the establishment of regular visits by independent international and national bodies in places where people are deprived of their liberty in order to prevent the commission of torture and other cruel, inhuman or degrading treatment or punishment.

In the domestic sphere, the 1987 Philippine constitution provides under Section 2, Article II that it 'adopts the generally accepted principles of interna-

tional law as part of the law of the land'. Likewise, the Bill of Rights provision in Section 19(2), Article III prohibits the employment of physical, psychological and degrading punishment and the use of sub-standard or inadequate prison facilities as well as outlaws the use of 'secret detention places, solitary, incommunicado or similar forms of detention'. The infliction of cruel, inhuman or degrading punishment is also explicitly prohibited under Section 19(1), Article III.

Months after the CAT concluding observation was released, in compliance with its treaty obligations the Philippines towards the end of 2009 enacted Republic Act 9745, otherwise known as the 'Anti-Torture Act of 2009' (hereinafter, RA 9745), which explicitly defines, prohibits and penalizes torture and other cruel, inhuman or degrading punishment or treatment and even declares that the right to freedom from torture and other cruel, inhuman or degrading punishment or treatment as an absolute right.

Although the international rights norms for the humane treatment of prisoners are incorporated in the Philippine domestic legal system, the concluding observations of the CAT shows that the Philippines is not able to comply with international standards in the treatment of prisoners.

Why human rights laws rarely provide the whole solution to end human rights violations (Khan 2009: 202-221) as shown here in the Philippine experience, will be explained using socio-legal approach, which sees human rights laws as not existing in a vacuum and thus not insulated from the wider socio-political and economic structures of society (Banakar and Travers: 2005)

2.3 Socio-Legal Approach to Evaluating the Rights Narratives

Merry (2006a: 179) argued that human rights must become part of society's legal consciousness and must fit into the existing normative structure and ways of thinking to make it acceptable and achieve its emancipatory potential. That rights must be culturally legitimate (*Ibid.*) is crucial so that rights claims made by people will not be treated as unimportant, unreasonable, or insignificant (Merry 2006a: 215). It is not enough that rights are legislated in the domestic legal system for it may just be defeated by interests hostile to that right. The most crucial thing is to make that right acceptable to all.

Likewise Fortman (2006: 35) said that 'while the whole idea of human rights is based upon the expectation that evident violations will lead to contentious action resulting in redress, human rights often remain without effective remedies. This is due to crucial deficiencies: first, the inadequacy of law to check those in power; second, and the lack of receptivity to these rights in many cultural and politico-economic contexts'.

One cannot very well argue against cultural legitimacy as an extremely significant factor in determining compliance with human rights norms, it being supported by several empirical studies. Hence, the reason socio-legal approach is chosen as analytical framework in this study.

How does one then make human rights acceptable to society? This brings us to the role of '*translators*'. Translators are agents whether community leaders, NGOs, social movements that can make global ideas such as human rights be-

come acceptable and meaningful in a particular social setting (Merry 2006b). Referred by Merry (2006a: 179) as 'localizing transnational knowledge of rights', translators make possible the incorporation of human rights into local cultural systems and for people to see their problems in human rights terms. Translation enhances rights consciousness and make the most vulnerable and in need of rights recognize their entitlements and assert their rights (ibid.). Translation can ultimately empower people to claim their right with the aid of the law (Khan 2009: 203).

That human rights laws are not implemented on the ground due to a hostile environment (Ibid.: 205) is illustrated in the law prohibiting cruel, inhuman, degrading punishment or treatment. This is exacerbated by research data suggesting lack of translators of prisoners' rights in Cebu. The concept of sociology of punishment will be used as a further analytic lens in examining this phenomenon.

2.4 Sociology of Punishment: Why It Matters?

Why should offenders be punished? The utilitarian answer to this question will be '*to prevent crime*'; while the retributivist answer will be '*because they deserve it*' (Hudson, 1996: 38). I will argue that the retributivist perspective towards punishment is resistant to the human rights norms for humane treatment of prisoners and in a society where retributivism remains the dominant popular sentiment, endeavours to making the society legally conscious of this particular right may prove to be difficult.

Hudson (1996: 3) broadly categorized the perspectives of punishment into two: 1.) Utilitarian – which sees the goal of punishment as to prevent future crime; 2.) Retributivist – which holds that the aim of punishment is to exact retribution from offenders for their crimes and is punitive in character.

Utilitarianism has an instrumentalist-functionalism view of punishment as 'strategy for control' through a mix of deterrence, incapacitation, and rehabilitation (Hudson 1998), the ultimate goal of which is to prevent future crime (Hudson, 1996: 3). Deterrence aims to prevent the commission or re-commission of crime through threats of negative outcomes (Dissel 2008) such as long prison sentences (Hudson, 1996: 4). According to Dissel (2008) however, research has not proven that deterrence has any significant impact on the crime rate. Incapacitation aims to prevent crime though rendering the offender incapable of committing further crimes by his or her removal from society by way of imprisonment (Ibid.). Rehabilitation aims to reintegrate the offender into society after a period of punishment as well as to design punishment to achieve this objective (Hudson, 1996: 26). It seeks to bring about change in some aspect of the offender thought to cause offender's criminal tendencies such as attitudes, cognitive processes, personality, or mental health for the purpose of making the offender less likely to break the law, or to reduce recidivism (Dissel 2008).

Retributivism sees punishment as putting moral blame on the offender. Its aim is not about crime prevention but retribution (Ibid.). It can best be summed up by Immanuel Kant's 1788 work, *Critique of Practical Reason*, quoted in Rachels (2007: 510) thus:

When someone delights in annoying and vexing peace loving folk receives at last a right good beating, it is certainly an ill, but everyone approves of it and considers it as good in itself, even nothing further results from it.

The declared purpose of imprisonment under international human rights laws, specifically under the ICCPR is for the rehabilitation and reformation of the prisoner. Rehabilitation stems from the idea that human behaviour is the product of antecedent causes and that therapeutic measures like educational and vocational training, counselling, or medical treatment can actually cure criminal tendencies of the offender (Dissel 2008). According to Dissel (2008), the rehabilitation ideal served as basis for penal reform originally in the West, which later has been adopted by the UN.

Whether the rationale for punishment in the Philippines is for retribution or rehabilitation is moot. International human rights norms and our domestic laws, in principle, already embraced the rehabilitative ideal of punishment.

Despite the incorporation of the rehabilitative framework of punishment into the domestic legal system, however, this hardly made a dent in Philippine prisons as borne out by increasing crime rate (International Centre for Prison Studies 2011) and sharply rising recidivism (National Statistics Coordination Board 2011). One is then given to wonder whether the Philippines actually employs rehabilitative measures which are supposed to curb criminality or is still stuck with the retributivist ideal which has no utility at all other than being just to be mindlessly punitive and satisfy a general desire to put moral blame on the offender. So we ask: Why still maintain punishment when it does not serve its purpose? Or should punishment be strictly viewed in a means-end framework?

Garland's theory on sociology of punishment, or 'the body of thought which explores the relations between punishment and society, its purpose being to understand legal punishment as a social phenomenon and thus trace its role in social life' (Garland 1990: 1) can be illuminating.

Commenting on Garland's work, Hudson (1998: 554) said: 'by focusing on punishment as an institution in itself rather than as one among many mechanisms of control was able to demonstrate the distinctiveness of punishment and to reconnect it with cultural aspects of society which are lost in the functionalism of seeing punishment (merely) as a means of control, ignoring its expressive aspect'.

To Garland (1990), in order to fully comprehend modern punishment, the Foucauldian view of punishment's rationale as an instrument for control, must be wedded to the Durkheimian view of punishment as something that is not rational nor instrumental, but is irrational, unthinking emotion, such that passion is central to punishment, the essence of which is its being the expression of the so-called conscience collective (*Ibid.*). Modern punishment should be therefore understood as the 'realm for the expression of social value and emotions as well as a process for asserting control' (*ibid.*: 4).

This Durkheimian social sentiment thesis, viewed as the 'direct and powerful expression of conscience collective relayed through the medium of individual consciences who composed it' (*Ibid.*: 7-8) best explains the retributive purpose of punishment. And as Garland put it: 'The punitive reaction is thus a

defensive response, grounded in the individual's sense of the sacred, and triggered by any crime which violates this deeply held beliefs' (Ibid.: 8).

The combination of the Foucauldian concept of state control and the Durkheimian social sentiment thesis that Garland argued as 'forces which play a part in the process of punishment' (Ibid.: 10) is the lens by which the wide disparity between right and reality will be examined in the case of the human right of prisoners' against cruel, inhuman, or degrading punishment or treatment.

2.5 Setting the Standards Straight

In order to address the research problem and to effect a proper assessment of the human rights situation in the prisons, it is important to level-off what comes within the purview of the term 'cruel, inhuman, or degrading punishment or treatment'.

As earlier emphasized, the UDHR prohibits abusive treatment of prisoners in the form of torture and other forms of cruel, inhuman or degrading punishment or treatment. This UDHR provision is echoed in the ICCPR, which further provides that persons in detention shall be treated with humanity and respect for their dignity.

These international instruments, however, do not provide a definition of these concepts. Only torture, although not defined under the UDHR and the ICCPR, has been given a specific meaning by the UNCAT.

The term 'cruel, inhuman or degrading treatment or punishment' however, remains not defined by any of the treaties or conventions mentioned above. Thus, the question now is: What is cruel, inhuman or degrading treatment or punishment then by international standards?

Rhona Smith (2012: 239) posits that although there is no universal definition of 'cruel, inhuman or degrading treatment or punishment', the term can be understood in the light of the definition of torture because it entails a lesser degree of severity than torture.

To some international human rights expert, prison conditions are a key consideration in determining existence of cruel, inhuman or degrading punishment or treatment as these impact most directly the experience of prisoners while in prison (Easton, 2011: 69).

The SMR, although it does not provide in detail a model system of penal institutions, sets a standard on what constitutes good principle and practice in the humane treatment of prisoners. These are:

- Separate accommodation between sentenced and remand prisoners; male and female; adult and children
- Accommodation should meet requirements of health taking into account climatic conditions; there should be only one person in a cell but if this is not possible, overcrowding must be avoided; separate and sufficient bedding for each prisoner to be always kept clean

- Sanitary installations must be adequate, clean and decent as well as adequate shower and bathing installations
- Prisoners to be allowed their own clothing, if disallowed by prison rules the clothing provided must not be degrading or humiliating
- Provision of food must be at the usual hours and they shall be of adequate nutritional value for health and strength and of wholesome quality; drinking water must be made available anytime
- Prisoner to be provided the opportunity to exercise outdoors at least one hour daily, weather permitting
- Availability of at least one medical officer for each prison facility and the provision of adequate medical treatment to every prisoner, including dental and psychiatric needs
- Women institutions to be provided with the necessary natal care and treatment

Aside from the SMR, there is also the 1988 UN General Assembly Resolution called the Body of Principles For The Protection Of All Persons Under Any Form Of Detention Of Imprisonment. This resolution reiterates the UDHR and ICCPR principles of affording at all times the basic civil liberties of detained persons. Two years later, in 1990, the UN General Assembly Resolution named the Basic Treatment For The Treatment Of Prisoners followed suit. It again mandates that prisoners shall be treated with the respect due their inherent dignity and value as human beings.

The CAT considers as cruel, inhuman or degrading punishment or treatment the following, among others: detention in a cell for 22 hours without meaningful activity; prisoners having to pay for a portion of expenses related to their imprisonment; reprisals for reporting acts of torture and other ill-treatment; prolonged solitary confinement; prolonged incommunicado detention (Committee Against Torture 2006).

Under the ICCPR, some of the more significant pronouncements of the Human Rights Committee (HRC) the following come within the purview of cruel, inhuman, or degrading punishment or treatment are: 1.) causing mental or psychological suffering and physical pain to the prisoner; 2.) acute deprivations such as denial of proper medical care and lack of decent food; 3.) detention in a cell without adequate bedding, natural light, and proper sanitation instalments; 4.) beating of prisoners whether done by jail authorities or private individuals such as fellow prisoners; 5.) any treatment that is humiliating (Human Rights Committee 2006).

In this paper, the concept 'cruel, inhuman, or degrading punishment or treatment' is meant those standards set by the international human rights bodies which essentially refers to it as any act or condition that can cause physical, mental, and psychological suffering to the prisoner and necessarily includes conditions of detention not in keeping with the dignity of the prisoner as a human being.

Chapter 3

Overview of the Philippine Prison System

This chapter provides brief history and summary of the Philippine prison system and policies. It shows the current set-up of the Philippine prison regime, describing the evolution of the theoretical underpinnings of the Philippine prison regime from being punitive to rehabilitative and the influence of the international human rights norms to the government's current prison policy framework.

3.1 Retributivism in Pre-colonial and Colonial Period

The pre-Spanish colonial era was marked by basic political diversity. Formal prison system was non-existent. The main political unit was the *barangay* which exercised jurisdiction within its small territorial limits composed mostly of about 100 to 200 families (Albis et al.: 1977). Imprisonment was unheard of. There were no prisons to house any felon since punishment was mainly retributive, with penalty ranging from death, incineration, flagellation, mutilation, swimming under water for a fixed time, ant treatment and fines (Ibid.).

The formal prison system in the Philippines started only during the Spanish regime, which was established in 1847 (Bureau of Corrections, 2012a). Spanish criminal justice system was punitive or retributive in character (Albis et al.: 1977).

Not much changed when American rule substituted Spanish rule in the 1900s. Penal system remained to be retributive and punitive (Ibid.). However, the Revised Penal Code, which was the codified criminal laws at that time (and up until the present) has some redeeming features such as the mitigating and exempting circumstances provision wherein the circumstances of the criminal at the time of the commission of the crime are to be considered for purposes of lowering down penalties (Ibid.).

After the colonial period, punitive or retributivist punishment began to wane with the onslaught of reformist ideal towards imprisonment.

3.2 Prison Reforms following Independence

During the commonwealth period when the Philippines was granted self-government but was still technically under American rule, the idea of humane punishment began to surface. Under the 1935 Philippine Constitution, there already was a prohibition against cruel punishment, under Article 1(19) thus: 'Excessive fines shall not be imposed, nor cruel and unusual punishment inflicted.' When the Philippines gained independence after the Second World War, rehabilitation or reformation of prisoners and humanizing prison conditions began to be advocated. The DOJ issued rules for the treatment of prisoners which aimed at the rehabilitation of the criminal. The purpose for such rules was not merely to punish the crime but likewise to rehabilitate or correct the criminal (Ibid.).

The term ‘rehabilitation’ entered the official jargon of prisons in the country in 1955. This was when the Geneva Convention introduced the United Nations Standards on the Treatment of Prisoners to which the country is a signatory. Considered a breakthrough in protecting the rights of the incarcerated or those under the custody of law, rehabilitation has become the principal goal of Philippine prisons since then (Bureau of Corrections 2012a).

The old (1935) constitution guarantee against cruel and unusual punishment finds resonance in the 1973 constitution and further finds its way again in the 1987 constitution, but, whereas in the previous two constitutions the prohibition was on cruel and/or unusual punishment only, the prohibition clause now was broadened to cover all kinds of ‘cruel, inhuman, or degrading punishment or treatment’. It must be noted that the 1987 constitution was drafted after the Philippines signed the UNCAT that uses the terminology ‘cruel, inhuman or degrading punishment or treatment’.

Aside from the constitution, RA 9745 likewise outlaws cruel, inhuman, or degrading punishment or treatment. The legislation is aimed towards ensuring the promotion prisoners’ rights and in furtherance of the rehabilitation and reformation of prisoners.

Here we see an incorporation of the international human rights norms for humane treatment of prisoners to the Philippine domestic legal system. The significance of this incorporation in the current Philippine prison system is elaborated below.

3.3 The Current State of the Philippine Prison System

At the outset, it is important to recall a point made earlier that in the Philippines prison and jail both mean a place of detention, although they are two different concepts in strict technical and administrative terms and under two different agencies of the government. Because of this set-up, both the joint civil society report to the CAT and the US Department of State report mentioned earlier described the Philippine prison systems as very fragmented. According to the civil society report, the non-existence of one integrated prison system makes it difficult for government to implement measures to monitor and prevent acts of torture and cruel, inhuman or degrading treatment or punishment most especially in provincial and district jails which are obscure places from the national government’s vantage point.

The above said, the current official policy framework for both prisons and jails in the Philippines is, in principle, for the rehabilitation and reformation of prisoners and to respect their human rights and dignity.

Specifically with the Bucor, its official name before was Bureau of Prisons but was changed of Bureau of Corrections in 1989 under the post-Marcos regime of President Corazon Aquino, because of the overriding consideration for rehabilitation of prisoners. Its current official mandate is stated as: ‘*The principal task of the Bureau of Corrections is the rehabilitation of national prisoners*’; and their official slogan reads: ‘*Bringing back the dignity of man*’ (Bureau of Corrections 2012b).

The BJMP is a relatively new government agency. It was created in 1991 under Pres. Aquino in order to professionalize jail management and services which previously was under the defunct Philippine Constabulary/Integrated National Police (PC/INP) of the Marcos regime (Bureau of Jail Management and Penology 2012). BJMP is tasked to take over operation and administration of municipal, city and district jails with the primary aim of rehabilitation of prisoners. It has four major areas of rehabilitation program, namely: Livelihood Projects, Educational and Vocational Training, Recreation and Sports, and Religious/ Spiritual Activities. These are to be continuously implemented to eliminate the offenders' pattern of criminal behaviour and to reform them to become law-abiding and productive citizens (Ibid.).

It is clear that the government in adopting these policies for rehabilitation and reformation of prisoners has in mind the rehabilitative ideal of imprisonment set by international human rights norms. However, data suggests this is not felt on the ground.

First, the CAT concluding observations in 2009, reported about Philippine prison system, the following: 1.) sufficient basis to believe the widespread, consistent and credible reports of use of torture and ill-treatment against persons under detention; 2.) presence of high number of complaints of torture and ill-treatment committed by state officials but limited number of investigations and much more limited number of convictions; 3.) several instances that the CHR is denied entry in certain jails, prisons and other detention facilities; 4.) severe overcrowding, sub-standard facilities, and lack of basic facilities in jails, prisons and other detention facilities; 5.) existence of credible reports of rape and other forms of sexual abuse against women prisoners and the placement of male and female prisoners in the same cell; 6.) instances that children are still detained together with adults; and, 7.) lack of information on monitoring and evaluation of the impact of these training programs aimed to eradicate torture and other cruel, inhuman, or degrading punishment or treatment (UN Committee Against Torture 2009, pars. 11-20, pp. 5-12).

Second, a report (US Department of State Human Rights Country Report 2010) released in 2011 by the US State Department on human rights practices in the Philippines confirmed the CAT 2009 observations. This report enumerated rampant and widespread violations of prisoners' rights in the Philippines, including:

- Torture as an ingrained part of the arrest and detention process
- Physical abuse of prisoners by prison officials is common
- Women vulnerable to sexual abuse by prison officials
- Harsh prison conditions characterized by overcrowding, lack of basic infrastructure, inadequate nutrition and medical attention
- Lack of potable water, poor sanitation, poor ventilation causing health problems
- 871 deaths in 2010 alone due to cardiopulmonary diseases and tuberculosis

Third, the problem of increasing crime rate and rising recidivism. Current population of Philippine prisons shows over congestion by approximately 300%, meaning more and more people are committing crime as indicated by

the increase in the number of prisoners from 35,000 plus in 1993 to 100,000 plus in 2009 (International Centre for Prison Studies 2011). Prison rate per population has more than doubled, from 53 prisoners/100,000 population to 111 prisoners/100,000 population (*Ibid.*). Likewise, recidivism has been significantly rising from 2004-2008 as one government agency has reported (National Statistical Coordination Board 2011).

Undeniably, given the current state of Philippine prisons, the incorporation of the international human rights norms for humane treatment of prisoners in the constitution and the laws did not translate to actual implementation or enforcement of these norms.

Chapter 4

The Malaise of the Right: Findings and Analysis

Among the more important findings in this study is that the lived realities of the prisoners reveal a blatant violation of the norms for the humane treatment of prisoners. More importantly, there is a clear showing of lack of legal consciousness among all actors. It is evident in what data indicates that violations of the human right of prisoners against cruel, inhuman, or degrading punishment or treatment are not seen in rights terms and the pervasive narrow notion of the right. Knowledge of rights which will lead to legal consciousness is crucial because one's willingness to see their problems in rights terms and adopt rights framework depends on one's knowledge of the rights one is entitled to (Merry 2006a: 215). In the same manner that how that right claim is treated depends on the rights consciousness of those who are supposed to implement and enforce it (Ibid.). By way of analysis, I will argue that this lack of legal consciousness is due to fact that society is not fully receptive of this right, the ultimate reason of which is the dominance of the retributivist view of punishment.

The three tables in the Appendices section are the data on the inmates-respondents. It is indicative of what Vivien Stern (1998: 114) said that most prisoners come from the poor, the uneducated and the unemployed. It is readily noticeable in the data that there is only one inmate who graduated from college. More than half did not graduate from elementary. Few have reached high school. All but one does not have their own lawyer. This just proves that in prison the underprivileged and the marginalized are overrepresented. Indeed, as what Stern said: 'The prison is the magnifying mirror which reflects and enlarges the social problems of the society which it serves' (Ibid.).

4.1 Conditions Inconsistent with Human dignity: The Lived Realities of Prisoners

In the words of one prisoner¹:

When I was little my grandmother said that hell is too hot, it is the hottest of all places. Now I am beginning to think that my jail cell, because of severe overcrowding, with no electric fan, with a window too small, and with a smell from the toilet that is almost unbearable because there is no water to flush the waste, perhaps this is the hell that my grandmother in the past meant. So hell is on earth, not a place we go to when we die.

This statement encapsulates that conditions in the prisons, laid out in details below, are inconsistent with human dignity, a clear contravention of the human rights norms, validating what Carey et al. (2010:12) said that human

¹ Personal interview with inmate 1 of Jail B

rights is confronted with the problem of huge gap between the promise of formal rights and harsh realities.

4.1.1 Severe Overcrowding and its Effects

International standards provide that prison accommodation must comply with the requirements for, adequate space, proper ventilation, and suitable sleeping accommodation². In the Philippines, while there is no specific policy guideline regarding prison accommodation, jail management is guided by the BJMP vision of 'humane safekeeping and development of inmates'³, according to the Jail A Female Dormitory warden (hereinafter, Warden 1).

For Jail A Female Dormitory, the warden⁴ said that the 8 cells in the jail are designed to accommodate 20 inmates only. But since there is a wide disparity between those who go out and who come in, prison authorities are left without a choice but to stuff the cells beyond their designed capacity. Warden 1 said that the 20 inmates in a 25-sq. m. cell is even way below international standards. Jail A Female Dormitory has a 32% over congestion rate, it is supposed to hold only 160 inmates but in July 2012 it has a total of 211 inmates.

The same goes with the Jail B Male Dormitory. It's warden⁵ (hereinafter, Warden 2) admitted that the 52 cells in the jail with an area of 74 sq.m. are designed to accommodate 25 inmates but all cells are now actually holding over 30 inmates, some even hold over 40. The capacity of the male dormitory is only 1300 but it holds 2113 inmates – a 63% over congestion rate as of July 2012. Warden 2 admitted that even if the 25 inmates per cell is followed, still this is not in compliance with international standards.

The data also paints a picture of severely overcrowded cells in the Jail C. In the female dormitory, the over congestion rate is 124%. It only has one jail cell with 114 sq. m. floor area, designed to hold 38 inmates. But as of July 2012 the inmate population is 85, as revealed by the jail warden⁶ (hereinafter, Warden 5).

The male dormitory of the Jail C is worse, with 243% over congestion rate according to its jail warden⁷ (hereinafter, Warden 4). It has jail cells of 10 sq. m.-size each, designed to accommodate 3 inmates each only. But as of July 2012, Warden 4 said that the average actual inmates in each cell is 20.

The Jail B male dormitory is the worst. It is 477% over congested as of July 2012, as revealed by its warden,⁸ (hereinafter, Warden 3). Its jail cells that measure 5 sq. m. in area are designed to hold 4 inmates, but they're actually holding an average 15 inmates. The jail cells with 18 sq. m. floor area supposed to accommodate 12 inmates are actually holding 40-50 inmates. There is even a few that hold up to 60 admitted Warden 3.

² Paragraphs 9-19, UN Standard Minimum Rules for the Treatment of Prisoners

³ Personal interview with Warden 1 (hereinafter, Warden 1 interview)

⁴ Warden 1 interview

⁵ Personal interview with Warden 2 (hereinafter, Warden 2 interview)

⁶ Personal interview with Warden 5 (hereinafter, Warden 5 interview)

⁷ Personal interview with Warden 4 (hereinafter, Warden 4 interview)

⁸ Personal interview with Warden 3 (hereinafter, Warden 3 interview)

Overcrowding has very serious effects on the day-to-day life in prison. It brings tension and friction among prisoners. Warden 3 said that ‘inmates are so hot-headed because the jail cells are so cramped, the reason why there is always infighting inside the cells. So we let them go out of the cell and let them stay in the hallway’.

An inmate of Jail A said:

Because of our very cramped cells, since I was in prison 5 years ago, I would be very happy if I’d be able to sleep 2-3 hours in the 24-hour day. This explains why I am very thin now and always sickly⁹.

When asked how they sleep with severe overcrowding, one inmate of Jail C said, smiling sarcastically: ‘well, we practice to be like a horse, we sleep while standing’¹⁰.

Another most serious effect of severe overcrowding is the spread of diseases. An interview with an inmate of Jail B had this to say:

It’s really so bad here in our cell. If one catches cough, colds, contagious skin lesions, or sore eyes, the very next day another one gets it. The next few days all of us will have it.¹¹

Spread of diseases is likewise recounted by an inmate of Jail A. He narrated that:

We would never know if and what kind of ailment each of us have, because there is no medical check-up for there is no doctor. We would only know if the ailment is so serious already because it becomes obvious. Then we would know later that the ailment passed on to us if there is a medical mission by NGOs. If the medical missions will not come in a long time, well, then no luck for us.¹²

4.1.2. Undernourished and Malnourished Prisoners

By international standards, prisoners shall be served with ‘food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served’.¹³ Whether there is official written guideline on provision of food for prisoners, Warden 3 said they have none but have a budget of PhP50/day per inmate across the board for all BJMP-supervised jails.¹⁴ The prison management for each jail facility is given a wide leeway on how this should be spent, with the understanding that jails must provide for the basic needs of the inmates within this budget.¹⁵

All the jail wardens said that this PhP50-daily meal budget, roughly equivalent to US\$1.10, covers not only the food itself, but also operational expenses in preparing these meals such as fuel, transportation cost in buying the food, labour cost for the staff that prepare the meals, and incidental expenses. They

⁹ Personal interview with Inmate 3 of Jail A

¹⁰ Personal interview with Inmate 2 of Jail C

¹¹ Personal interview with an Inmate 2 of Jail B

¹² Personal interview with an Inmate 4 of Jail A

¹³ Paragraph 20(1) UN Standard Minimum Rules for the Treatment of Prisoners

¹⁴ Warden 3 interview

¹⁵ Id.

all say that the P50-budget is too small, and not even enough for even one cheap but decent meal in the current living standards.¹⁶

Given the high and ever-increasing prices of basic commodities in the Philippines, what does this mean for the prisoners?

A male inmate of Jail A commenting about prison food said: 'The food servings are really small. They are not really enough, you would go hungry again in less than 2 hours. The food served is of the cheap kind, without nutrients'.¹⁷

In Jail B one inmate said: 'The same kind of food is served. There is no time I remembered that my meal was enough. I always feel dizzy and weak because of hunger'.¹⁸

This prison diet of a PhP50-meal budget per day is especially hard for pregnant inmates. Two female inmates, one from Jail B and the other from Jail C, recounted that when they gave birth their babies are so sick and they attributed this to the severe lack of nutrients while still pregnant. They said that even when pregnant, there was no increase in the amount of serving of their food.¹⁹

4.1.3. Lack or Absence of Proper Medical Care

International law provides that states have an obligation to ensure adequate and proper medical care for prisoners. The SMR further provides for the availability of one qualified medical officer for each prison facility; special accommodation for natal care and treatment in women's institution; provision of dental care; the need to examine each prisoner after admission to the detention facility; and segregation of prisoners with contagious conditions. Although there is no specific official policy issuance on inmates' medical care, the BJMP Manual of Operations (2007: 114) speaks of subjecting a new inmate to medical examination. So far this is the only written rule related to medical care in prison, admitted Warden 5.²⁰

How poor is the medical care in these jails is revealed by interviews with wardens and inmates. Warden 1 said that there is only one doctor serving the whole of the Central Visayas region, a region with four provinces composed of several cities and hundreds of municipalities. The doctor even serves as warden of the Jail B Female Dormitory so she is not even serving full-time as prisons doctor for the entire Central Visayas²¹. Warden 3 said that compared to the inmate population of his jail facility, the supply of medicine for common illness such as coughs, colds, or fever and others is so inadequate, so that if inmates

¹⁶ Personal separate interviews with the Warden 1, Warden 2, Warden 3, Warden 4, and Warden 5

¹⁷ Personal interview with Inmate 5 of Jail A

¹⁸ Personal interview with Inmate 2 of Jail B

¹⁹ Personal interview with Inmate 4 Jail of Jail B and Inmate 3 Jail C

²⁰ Warden 5 interview

²¹ Warden 1 interview

get sick they have to wait for visits by their family and friends before they can be given medication.²²

What is extremely pitiful is this story of an inmate in Jail B:

If you have a serious sickness but which is actually curable, don't hope that you will be cured, because you will never really get proper treatment. It will even get worse because all those with serious ailment will be put together in one cell, and they will contract each other's ailment.²³

A male inmate of Jail A who assists the staff in the jail clinic said, jokingly: I told my fellow inmates that if they get sick, they make sure it will be on the first week of the month because the supply of medicine from the region every month is so insufficient, it last only in the first week, sometimes it lasts for two weeks but this is very rare.²⁴

4.1.4 Poor Sanitation and Hygiene

As laid out by international standards, detention facilities are to be provided with adequate sanitary installations, including bath and shower to enable the prisoners to comply with the calls of nature and have bath and shower for hygiene²⁵. Again even if there is no specific policy guidelines regarding this, the BJMP general mandate is for the continuous improvement of jail facilities.²⁶

All inmates-respondents, except the inmates in Jail A Female Dormitory, related that they have to endure with long hours of water supply interruption everyday resulting to un-flushed toilets in their cramped cells and skipping baths for days in a very hot climate. One narrated that:

You would never want to breathe because it gives you headache and makes you sick because of the various kinds of bad smell from the toilet and the body odour of fellow inmates who haven't been able to bathe for several days.²⁷

4.1.5 Paying for Space to Sleep, Water and Food Items

To reiterate, a CAT decision in 2006 said that prisoners having to pay or share in the expense during their detention is cruel, inhuman, or degrading punishment or treatment (Committee Against Torture 2006).

In contravention of this CAT pronouncement, inmates and wardens alike admitted that prisoners have to bring their own beddings, blankets, and pillows because these are not provided in prison. An inmate of Jail A said that on average the cells accommodate over 30 inmates, but usually the beds provided are good for 8 only. This meant inmates competing for bed to sleep. Bed is available for the highest bidder and this goes to the inmates' common fund for

²² Warden 3 interview

²³ Personal interview with an Inmate 1 of Jail B

²⁴ Personal interview with an Inmate 4 of Jail A

²⁵ Paragraphs 12 and 13, United Nations Standard Minimum Rules for the Treatment of Prisoners

²⁶ Warden 4 interview

²⁷ Personal Interview with Inmate 1 of Jail C

that particular cell. The funds raised will be for any emergency situations for the inmates, mostly for hospitalization, as the prison cannot provide for proper medical care.²⁸

Toiletries such as shampoo, soap, toothpaste, toothbrush, and the like are likewise not provided. Prisoners have to buy them from the store inside the prison or have to wait for family visits to have these items.

Warden 1 said that inmates have to buy their own coffee or hot chocolate during breakfast as these are not provided in the prison breakfast menu due to budgetary constraints. And as narrated by an inmate in Jail C: 'Well, for me I don't drink the water here in prison because I would get an upset stomach drinking it. But there is purified water for sale so I would buy rather than risk having an upset stomach'.²⁹

4.1.6 Segregation Issues

The SMR provides that sentenced prisoners shall be kept separate from the prisoners on remand.³⁰ This can be found in the BJMP Manual of Operations (2007: 122) stating that there shall be different classes of prisoners shall be separated from each other: sentenced from remand, male from female, or adult from minors.

Segregation of male from female and adults from minors, while already enforce, sentenced and remand prisoners however are still living in the same quarters or cells in the three jail facilities. When asked why there is no segregation, Warden 3 answered: 'Where do we place the sentenced prisoners if they are to be kept separate? We don't even have a place for those who are sick, how much more the sentenced prisoners?'.³¹ Warden 4 of Lapu-lapu City said about segregation: 'It's in our Manual of Operations that sentenced prisoners should be kept separate, but there is simply just no space. We are even so overcrowded now because the place is too small'.³²

How dire the conditions of detention in these jail facilities is obvious. Conditions so poor that by international standards are inconsistent with human dignity and constitute violations of the human rights norms for humane treatment of prisoners. These conditions reflect what the Asian Legal Rights Center report (Asian Human Rights Commission 2010) that describes the Philippine prisons, as:

The prison in the country has become a dungeon, an isolation cell and a place where prisoners had to learn how to survive. They are trapped in an environment where not even an iota of their supposed rehabilitation and reintegration to the society ever existed. The prison system itself--structurally and systemically--dehumanizes the prisoners. It is a mockery of the government's responsibility to rehabilitate law offenders while in prison; and to prepare for their reintegration after completing their jail terms; or, being declared by the

²⁸ Personal interview with an Inmate 6 of Jail A

²⁹ Personal interview with an Inmate 1 of Jail C

³⁰ Paragraph 8(b) of the United Nations Standard Minimum Rules for the Treatment Of Prisoners

³¹ Warden 3 interview

³² Warden 4 interview

court as innocent. The prison has rather become a frightening place and a place to escape from, not for rehabilitation of lawbreakers.

The above shows that indeed human rights is perennially plagued with the huge gap between the promise of formal rights and the cruel realities that people experience on the ground (Carey et al. 2010: 12). Interestingly however, these harsh conditions in prisons are not perceived as human rights violations.

4.2 Not Seeing the Violations in Rights Terms and the Vulnerability Issue

Both prison officials and inmates do not see these harsh conditions as constituting violations of the human right of prisoners against cruel, inhuman or degrading punishment or treatment.

4.2.1 Inmates' Perception

Take for example what an inmate City Jail A said when asked about what would she report to the CHR about a human rights violation in prison, if any:

I don't think there is something to report about our human rights. Our warden is a good person, prisoners here are never physically abused. If we ask, for example, water to drink we don't get any physical beating for it, not like the prisoners in Manila, I have heard that prisoners there would get some beatings if they ask for a lot of things³³.

Asked what she thought about the inhuman physical conditions, she said: 'I accepted it already. I don't think I have a right to protest because nobody pushed me here but a result of something I did.'³⁴

Similarly, an inmate of Jail B commented:

I will only complain if I'm physically beaten to death because that's already a violation of my human right. I will stop hoping about improvement in our living conditions here, our country is very poor, do you think they will prioritize the prisoners? It's very difficult outside the prison, while you're having breakfast you'll worry how you get the money to buy the next meal. And you even don't have a place to stay. This is a consequence of what I did, so I won't complain.³⁵

Another inmate was asked if, in the entire 6 years that she was in jail, she heard or noticed of prisoners complaining to the CHR about the awful conditions they experienced in prison, had this to say³⁶:

We don't complain at all. I think the people from human rights already know our condition here because when you are inside you can see it and it is obvious. So we don't complain because what they ask of us is also about whether we are physically abused here or confined in 'bartolina' or if the officials are

³³ Personal interview with Inmate 3 of Jail A

³⁴ Id.

³⁵ Personal interview with Inmate 2 of Jail B

³⁶ Personal Interview with Inmate 4 of Jail C

running a business inside. We don't complain because it's our fault, like me I was selling 'shabu'³⁷ when I knew it's a crime.

What is very interesting is this comment of another inmate, she said³⁸:

About torture and beatings I'll complain about it if it happens to me. With regard to our very poor conditions here as you can see, it is our own choosing. I was bad. I regret it but I have to accept my fate.

4.2.2 Prison Officials' Perception

No less than a ranking officer of the BJMP Central Visayas insinuated that, while his top priority will be that torture and any form of physical abuse or mysterious deaths of prisoners will be eradicated in the jails, claimed that there is nothing he can do about reports of dire conditions in prison because BJMP is only operating within the very meagre budget that the government allotted it. He added that the priorities of the government are understandable, because even public schools and hospitals are so underfunded.³⁹ He even posed a question to me and said:

You, Attorney, which will you prioritize? The school children, the sick, or the prisoners? But torture, physical abuse and solitary confinement are a clear human rights violation. That's in our BJMP trainings⁴⁰.

This sentiment was shared by the wardens interviewed. When asked why severe overcrowding in Jail B has never been resolved, Warden 3 said:

It's simply not a priority of both the national and local government. The BJMP will not construct a building if XXX⁴¹ City will not donate a piece of land for a new jail facility. What seems to be the only constant directive from the higher up is never to allow torture because it's human rights violation and we, jail officials, can go to prison for that aside from losing our job.⁴²

It can be inferred from the statements by the inmates and prison officials that violations of the right against cruel, inhuman, or degrading punishment or treatment relating to conditions of detention consistent with human dignity are not considered as human rights violations. In the case of the prisoners, they themselves believe that because it is by their own act that they landed in prison, they don't see a violation of their right in the inhumane conditions that they have to endure. Prison official themselves said that prisoners are unlike the abandoned street children or the rape victims whose fate was not of their own choosing.

Implicit here that vulnerability is seen as a crucial factor for victimhood, which is problematic as the situation here suggests.

³⁷ Shabu is the local name for the drug methamphetamine, an illegal drug in the Philippines under Republic Act 9165

³⁸ Personal interview with Inmate 5 of Jail C

³⁹ Personal interview with the top ranking officer on 24 July 2012

⁴⁰ Id.

⁴¹ For purposes of maintaining anonymity

⁴² Warden 3 interview

4.2.3 The Problem with Vulnerability

A human right violation not seen in rights term can be linked to the general notion that vulnerability is a requisite to victimhood. This is because, as Goodale (2007: 30-31) posited: ‘the international human rights system, though founded on statements of largely individual rights, was nevertheless created to protect vulnerable populations against the kind of large-scale outrages that had plagued Europe’. The implication of this emphasis on vulnerability is that it influences the determination who are human right victims and who are not (Merry 2007). Thus, to be considered a human right victim, the dimension of choice is very important (Ibid.)

4.3 Narrow(ed) Notion of the Right and What it Implies

Whereas by international standards the right against cruel, inhuman or degrading punishment or treatment covers a very broad area, the right is viewed on a very restricted sense not only by the prison officials but also by the prisoners. They confine it only to acts of torture, other physical abuse, and solitary confinements. This view is even shared by organizations volunteering in the prisons as well as by government lawyers interviewed.

The SMR provides that while discipline and order must be maintained in the detention facility, it should be with no more restriction than is necessary for safe custody and order.⁴³ There is a clear prohibition against corporal punishment, confinement in a dark cell or any close confinement, reduction of diet, or any other kind of punishment prejudicial to the mental and physical health of the prisoners.⁴⁴ These SMR rules are even transposed in the BJMP standard operating procedures for jails (Bureau of Jail Management and Penology Manuel of Operations 2007: 117).

4.3.1 What Officials Say

Asked about the prison policy of disciplining prisoners, Warden 2 was quick to quip that:

There is no longer corporal punishment and ‘bartolina’⁴⁵ because that’s cruel and inhuman, otherwise we will be charged of human rights violations. It’s only up to withholding of privileges⁴⁶.

⁴³ Paragraph 27, United Nations Standard Minimum Rules for the Treatment of Prisoners

⁴⁴ Paragraphs 31 and 32(1 & 2), United Nations Standard Minimum Rules for the Treatment of Prisoners

⁴⁵ In the Philippines, the word ‘bartolina’ is generally understood to mean a very small cell without window and lighting, where the one prisoner confined inside has very limited movement because of its size. It is a form of solitary confinement.

⁴⁶ Personal interview with Warden 2 (hereinafter, Warden 2 interview)

When asked about the reality of severe overcrowding and lack of medical care in his prison, the warden said:

That is inhuman, it's in the international law standards we learned in our trainings. But unlike torture, nobody can be charged for overcrowding. It's like a right which is not really a right at all.⁴⁷

Warden 1 also narrated that physical punishment and solitary confinement are no longer practiced because of human rights issues. The way prisoners are disciplined is strictly confined to withholding of privileges only, which may range from limitation of family visit, limiting phone calls outside, or limiting outdoor exercise. That there is no more physical abuse because according to her that is cruel and inhuman treatment.⁴⁸

4.3.2 What Inmates Say

An inmate of Jail A likewise narrated:

Physical abuse no longer exists. We, prisoners, know it's inhuman in the occasional lectures we got from the human rights office and law students. According to them, we should report right away any incident of physical abuse⁴⁹.

I asked this prisoner what did these organizations tell them about problems of severe crowding and other inhuman conditions of detention and she answered:

They told us to make it a priority to report something where someone can be charged in court. They said that for overcrowding and the like, we can never really charge anyone in court for that. So I said to myself that maybe this kind of living is normal for prisoners, as long as there is never any form of physical abuse.⁵⁰

But although inmates and jail authorities alike said there never have been incidents of inhuman treatment by jail authorities, the term being understood to mean torture and physical abuse only, it has been revealed that sometimes physical beatings occur as a way of disciplining an inmate, but this done by the inmate themselves. An inmate of Jail B revealed:

We prisoners have our own self-government here in prison and the jail officials respect that. In case of infighting between inmates, before we report that to jail officials, we resolve it by ourselves first. Sometimes, whoever is at fault, have to endure whipping by a rubber strip, from old tires.⁵¹

Asked if the prison authorities are aware of the whipping, he answered: 'They are aware but they said it's not inhuman because it is our self-government'.⁵²

⁴⁷ Id.

⁴⁸ Personal interview with Warden 1

⁴⁹ Personal interview with Inmate 3 of Jail A

⁵⁰ Id.

⁵¹ Personal Interview with Inmate 1 of Jail B

⁵² Id.

4.3.3 What Others Involved in Prison Work Say

In my interview with the CAPA personnel, I asked what is their main intervention to address the inhuman conditions of prison, he said:⁵³

Our priority is spiritual renewal so that the prisoners can accept their fate. I think it's given for prisons to be a bad place. But regarding torture and physical beatings, we encourage the prisoners to report these incidents because it's human rights violation and against the law.

In another interview, I asked a PAO lawyer, if under RA 9745, the law that tasked the PAO to assist victims in filing of cases in violation of the law, a case has been filed yet for what can be considered inhuman conditions other than torture and other types of physical abuse, and he answered⁵⁴:

No. There even is not a single case for torture and other physical abuse, because inmates are scared to complain, which is a clear case of RA 9745 violation, how much more these inhuman conditions of overcrowding and the like? You know some international law provisions are just impossible, at least here in our poor country. Who will you sue for overcrowding? It's very normal because people keep on committing crimes and the government has no budget to expand our prisons.

Another PAO lawyer (hereinafter, PAO lawyer 2) answered the same question, thus⁵⁵:

As far as I know there is none. Besides, those are not really our main target. A prison even in America is not a vacation place. This is a general knowledge. Torture is the most important priority as of now because it's against our morality and law. Also, the courts are not likely to entertain these kinds of cases because the Supreme Court, in one case which I forgot, said that poor physical conditions in prison have nothing to do with the right against inhuman treatment.

This pervasive view that the right against cruel, inhuman or degrading punishment or treatment is limited to torture and physical abuse only is confirmed by the CHR lawyer I have interviewed.

This is our challenge. People and even prison officials think that the right against cruel, inhuman, or degrading punishment or treatment does not extend to inhuman physical conditions. For example, if we have prison visits jail personnel would not deny about it. But torture and physical abuse they deny to death even if there are media reports of prison abuse.⁵⁶

4.3.4 What the Courts Say

Domestic jurisprudence in the Philippines has very little to say of what constitutes cruel, inhuman or degrading punishment or treatment and it is limited to the nature of the penalty prescribed for the crime in which the prisoner is sen-

⁵³ Interview with CAPA personnel on 10 August 2012 (hereinafter, CAPA interview)

⁵⁴ Personal interview with PAO lawyer 1 on 30 July 2012 (hereinafter, PAO lawyer 1 interview)

⁵⁵ Personal interview with PAO lawyer 2 on 1 August 2012 (hereinafter, PAO lawyer 2 interview)

⁵⁶ Personal interview with CHR lawyer on 23 July 2012 (hereinafter, CHR interview)

tenced. Judicial decisions limit the term only to a penalty that is flagrantly disproportionate to the offense (Bernas 2009: 573).

In the landmark case of Alejano vs. Cabuay⁵⁷, the Philippine Supreme Court dismissed the claim of the petitioners that their rights as prisoners were violated when the visit by their counsel was regulated and that there was cruel, inhuman or degrading punishment or treatment because of the poor physical condition of their prison cell. In so ruling, the Court said that:

While a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law, detention inevitably interferes with a detainee's desire to live comfortably. The fact that the restrictions inherent in detention intrude into the detainees' desire to live comfortably does not convert those restrictions into punishment.

It can be gleaned from this pronouncement that the Court in deciding whether cruel, inhuman, or degrading punishment or treatment exists, looks only on the nature of punishment without considering the right to conditions of detention consistent with human dignity as set by the human rights norms.

The court went on further to say that prison authorities must be accorded a 'wide-ranging deference' in implementing policies to maintain security, order, and discipline.

This is a clearly departure from what is set by the international human rights norms for humane treatment of prisoners.

4.3.5 Will RA 9745 Change the Restricted View of the Right?

With the enactment of RA 9745, can it be expected that things will change and improve the lot of the prisoners? Under the law, the terms 'torture' and 'cruel, inhuman, or degrading punishment or treatment' are now legally defined and criminalized. In essence, 'torture' is defined as an intentional act causing severe mental or physical pain on the prisoner⁵⁸; while 'cruel, inhuman, or degrading punishment or treatment' as any treatment less than torture that causes suffering, gross humiliation, and debasement of the prisoners.⁵⁹

In a 2012 study by two NGOs advocating for prisoners' rights, Balay Rehabilitation Center - Philippines (Balay) and Medical Action Group - Philippines (MAG), revealed that while the law is a significant legal development aimed to curb torture and other cruel, inhuman, or degrading punishment or treatment, still public knowledge about the law is very weak; incidents of violations of the law are underreported; there is lack of rigor in investigation of violations in the rare case that they are reported; cooperation between NGOs, the civil society and the CHR is poor; attention given by prosecutors on cases filed under the law is, at best, lackluster; and, virtually zero cooperation of the security forces and the law enforcement officers in investigations (Anasarias, et al., 2012).

⁵⁷ Gary Alejano, et al. vs. Pedro Cabuay et. al, G.R. No. 160792, 25 August 2005

⁵⁸ Article 3(a) RA 9745

⁵⁹ Article 3(b) RA 9745

That RA 9745 will not make a significant difference, at least insofar as humane physical conditions in prison are concerned, is shared by the PAO, hence:⁶⁰

My opinion is that the law is worded in such a way that for the physical conditions of prison, unlike torture and physical abuse, no one can be held responsible for it. If you look at the definition the implication is it's only in torture and other physical abuse that can one be sued. Besides the law has no corresponding budget. It's dead and it's designed that way because our government has other concerns like education for the children and others.

Scrutinizing the provisions of RA 9745, the law is not categorical and specific in its definition of 'cruel, inhuman, or degrading punishment or treatment'. It uses terms that can be subjected to varying interpretations which will not always be favorable to the cause of prisoners' rights promotion.

Undoubtedly, the common perception towards the prisoners' human right against cruel, inhuman, or degrading punishment or treatment is that the term is limited to acts of torture and other types of physical abuse only.

The question is: What are the implications of this restricted view of the right?

4.3.6 Implications of Restrictive View of Right

This restricted view of the right suggests that the old thinking of seeing rights in hierarchy still pervades. Civil and political versus socio-economic rights. Torture and other types of physical abuse seen as civil political rights, hence justiciable and enforceable. While humane conditions of imprisonment falling within socio-economic rights, thus its enforcement are contingent on the government's financial capacity.

One implication with this view is the dangerous assumption by government that economic scarcity is a convenient excuse for not implementing measures to promote humane conditions of confinement and improve prison conditions.

No less than a top ranking prison official said that the right against inhuman prison conditions is dependent on availability of resources, saying it has to give way to nobler causes like education and public health. The wardens themselves do not see inhuman conditions as violation of prisoners' rights because of justiciability considerations, saying they cannot go to prisons for it. Captured in the words of one warden, he said: 'But unlike torture, nobody can be charged for overcrowding. It's like a right which is not really a right at all'.⁶¹

That economic capacity is a requisite for the supposed justiciability of a right can inferred from one PAO lawyer's comment that to a certain extent the rights against inhuman conditions in prison is impossible in a poor country like the Philippines.⁶²

⁶⁰ PAO lawyer 1 interview

⁶¹ Warden 2 interview

⁶² PAO lawyer 1 interview

Another implication is about the prevailing jurisprudence that the term cruel, inhuman or degrading punishment or treatment is strictly seen in the nature of the penalty outside physical conditions of prison.

The PAO lawyer interviewed said that the target of their office is only to charge torture and other physical abuse because of a current court ruling that does not consider poor prison conditions as violation of prisoners' rights.⁶³ This confirms what Boerefijn (2009) said that the attitude of the judiciary represents either a potential boost or threat to promoting international human rights standards.

Indeed, human rights laws alone hardly ever solve human rights violations. Even with the incorporation of prisoners' rights in our constitution and in our laws, particularly RA 9745, still these are not enough to counter the hostile social environment that is resistant to this right. Hence, the prevailing restrictive view. This proves correct the argument by socio-legal theorists like Merry (2006a: 179) and Fortman (2006) that full acceptance of a particular right is very crucial to attain its emancipatory potential and to have effective remedies.

Why are violations not seen in human rights terms and why the pervasive narrow notion of the human right of prisoners against cruel, inhuman or degrading punishment or treatment is intimately linked to how society views punishment.

4.4 Dominant Punishment Perspective and its Manifestations

Interviews reveal that the dominant social sentiment is still stuck with the retributive view of punishment. Punishment is still seen as exacting retribution and placing moral blame on the offenders and punishing them because they deserve it (Hudson 1996: 26, 38). This is in total disregard of the rehabilitative ideals set by human rights norms and incorporated in the Philippine domestic legal system.

It is manifested on why there is little hope of improving prison conditions because it would anger the public, on why rehabilitative measures are not implemented because of the actual governmental priority which is more on ensuring prison security to protect the public from jail breaks, and on why there is lack of translators because of the apathy towards prisoners' rights advocacy.

4.4.1 Vain Hope of Improvements in Prison Conditions

In the interviews all the wardens admitted of the dire conditions in their respective jails, all for the same reason of a very limited budget, despite official policy declarations to make Philippine prisons comply with international standards.

When asked why is this so, here are some of the answers:

I believe the policy is for compliance on paper purposes only. In my experience, I asked the regional office for more budget and they answered it's not

⁶³ PAO lawyer 2 interview

the government's priority now. When I asked the mayor to help, he said that it will be hard to convince the city council because voters may not vote for them again if they know that the city donated money to the jails because people believe prisoners are not like those abandoned children in the streets who deserve the government's help.⁶⁴

One warden had this to say:⁶⁵

Because in reality our politicians only remember the prisoners during election time. They would come to the jails to campaign and promise to finance jail improvements that won't happen. Why? The public does not like it. They would say you are a criminal coddler if you start talking about prisoners' rights. People prefer public safety first before talking about prisoners' welfare.

Another warden said:⁶⁶

Things are really hard for prisoners. There are no NGOs that I know that go to the government or the media advocating for improvements in the jails. Even the media is only conscious of torture and grave physical abuse, hence they're the only ones reported. Nobody will go to a rally to improve prison conditions, especially now that a lot of people have been victimized by theft and robbery. They think prisoners get what they should get because they're not like those rape victims who did not choose what became of them.

This absence or lack of NGOs advocating for prisoners' rights, at least in Cebu, has been confirmed in an interview with a staff of Karapatan saying that prison work advocacy is never popular with funders, compared with environmental or gender rights advocacies.⁶⁷ He added that even with his organization, their work is strictly limited to political prisoners only and does not extend to prisoners charged with common crimes due to reason of donor preference.⁶⁸

All this hostile attitude towards prisoners' rights promotion can be attributed to what Stern (1998: 91) said that many people believe that prisoners have 'forfeited their rights to have rights'.

4.4.2 Non-implementation of Rehabilitative Measures

International and domestic laws provide that punishment is for rehabilitation and reformation of the prisoners. Whereas on paper this is the policy adopted in Philippine prisons, reality on the ground reveals otherwise.

No less than the wardens themselves admitted that there is no budget item for rehabilitation programs in their respective jail facilities. When asked what is the most overriding consideration in the actual current jail management practice, one revealed, thus:

What our superiors constantly emphasize is make sure prisoners would not be able to escape. That's why we have very high perimeter walls with barbed

⁶⁴ Warden 2 interview

⁶⁵ Warden 3 interview

⁶⁶ Warden 5 interview

⁶⁷ Interview with Karapatan staff on 14 August 2012 (hereinafter, Karapatan interview)

⁶⁸ Id.

wires. We get terminated if there is a jailbreak. But we don't get incentives if we go out of our way to invite people outside to rehabilitate the inmates.⁶⁹

Another warden answered:

It's public safety. I think prisons exist to protect the public from the criminals. To rehabilitate prisoners maybe when our government has lots of money. But this is not the case. Besides, there are many criminals who are beyond redemption.⁷⁰

Another one commented:

Our policies say it's for rehabilitation, but this cannot be done. Most of our jail personnel are even not trained how to rehabilitate. For me, I think it's already enough that the prisoners cannot commit further crimes because they are in custody now, they must be controlled.⁷¹

This punitive perspective on punishment, like the pervasive restricted view of the right, is admittedly a challenge that CHR is facing. Said the CHR lawyer in the interview:

The public view is that punishment is there to teach the criminal hard lessons for the bad things they did that angered the public, especially the crime victims. That's why our prisons are designed that way, it's not in reality designed for rehabilitation, but to assure the public that their government is tough.

This is good as long as also you don't forget the rights of prisoners. This is one thing that we want to change. This is a little difficult though because based on experience we have no NGO or civil society support in this, unlike sex trafficking or gender equality.⁷²

Although according to one warden⁷³ the BJMP has the so-called 'Therapeutic Community Modality Program' for prisoners who display anti-social behaviour and who suffer from substance abuse for the rehabilitation of prisoners. This program however, for lack of resources, was only implemented in Jail A Female Dormitory, among all the jail facilities under study in this paper. Moreover, this was discontinued due to budgetary constraints.⁷⁴

It is obvious here that prison rehabilitation is the least of the government's priority, a manifestation of lack of political will, an official disregard of the rehabilitative ideal of punishment.

4.4.3 Absence or Lack of Translators

What is conspicuously absent here are the translators that could frame violations of human rights norms as problems in human rights terms (Merry 2006b), whose intervention can make human rights relevant to whom it is supposed to protect (Merry 2006a: 210)

⁶⁹ Warden 2 interview

⁷⁰ Warden 3 interview

⁷¹ Warden 5 interview

⁷² CHR interview

⁷³ Warden 1 interview

⁷⁴ Id.

This is confirmed by Karapatan for the reason that prison work is not attractive to donors⁷⁵. This has been shared by one warden claiming that it is hard to expect improvement in prison conditions because there are no NGOs advocating for it.⁷⁶ The CHR itself admitted that one greatest challenge to their prisoners' rights work is the lack of NGO and civil society support.⁷⁷ Or even though there is an NGO working for the prisons, their intervention is one that does not question the system, but in fact condones it by advising prisoners to just accept their fate and that they have to endure the harsh conditions of confinement.⁷⁸

One foreseeable consequence of this is that the common understanding that the right against cruel, inhuman, or degrading punishment or treatment extends to torture and other forms of physical abuse only may remain unchallenged. This absence of translation to make the international human right standards fit to society's way of thinking can result to restricting human rights norms to those accepted by prevailing perceptions which can lead to, according to Marks and Clapham (2004), limiting the rights and reducing their scope. Human rights cannot achieve its emancipatory potential if not made part of the individual and society's legal consciousness (Merry 2006a: 179).

In sum, data tells us that the international human rights norms for the humane treatment of prisoners incorporated in the Philippine domestic legal system have been ignored by prison officials, the courts, the legislature, lawyers, interest groups, and the society in general. This clearly shows a lack of receptivity to this right, causing the lack of legal consciousness. This I argue are but mere repercussions of a punitive society.

4.5 Repercussions of a Punitive Society: The Bane of Prisoners' Existence

As Steiner et al. (2008:478) observed:

To say that there is acceptance of the principle of human rights on the domestic and international planes is not to say that there is complete agreement about the nature of such rights or their substantive scope – which is to say, their definition. Some of the basic questions have yet to receive basic answers. Whether human rights have to be viewed as divine, moral, or legal entitlements; whether they are to be validated by intuition, custom, social contract theory, principles of distributive justice, or as prerequisites for happiness; whether they are to be understood as irrevocable or partially revocable; whether they are to be broad or limited in number and content – these and kindred issues are matters of ongoing debate and likely will remain so as long as there exists contending approaches to public order and scarcities among resources.

⁷⁵ Karapatan interview

⁷⁶ Warden 5 interview

⁷⁷ CHR interview

⁷⁸ CAPA interview

Steiner's observation best sums up what has been ailing the human right of the prisoners against cruel, inhuman, or degrading punishment or treatment. It is the malaise of the right fueled by a punitive society.

That the punitive element is the dominant perspective is demonstrated in the prison governance that lacks specific and enabling policy guidelines for the humane treatment of prisoners and does not recognize the right in its entirety. The sentiment of prison officials that the right has to give way to more pressing concerns and nobler endeavors and that the overriding ends of punishment is achieved when prisons are secured to protect the populace from these criminal elements are indications of a punitive society. This is exacerbated by the lack of political will to improve prison conditions. Add that to the ambivalent language of RA 9745 showing a legislature that disregards international standards for humane treatment of prisoners. And the judicial pronouncement that prison authorities must be accorded a wide discretion in implementing policies to maintain security, order, and discipline, which in the words of Easton (2011: 33), has the effect of neutralizing rights.

That this official sentiment is being fed by an equally punitive society is evident in the fears of politicians that funding projects to alleviate prison conditions would anger the voters, in the admission by CHR that their prisoners' rights work lacks NGO and civil society support, in the statement by Karapatan that prison work advocacy is not a concern to donors, in the opinion of the persons involved in the prisons that dreadful conditions in prisons are but normal and expected and that prisoners must learn to accept it, and even in the fact that prisoners themselves are resigned to the idea of harsh prison realities because they behaved badly and thus deserved it.

Chapter 5

A Right More ‘Declared Rather Than Lived’: Conclusion and Reflections

‘A society should be judged not by how it treats its outstanding citizens but by how it treats its criminals.’

Fyodor Dostoevsky, The House of the Dead

This paper begins with the argument that the rift between prisoners’ rights in the books and prisoners’ rights as are practiced on the ground is due in large part to the dominance of retributivist view of punishment in society.

It seeks to answer this core question:

To what extent do the international human rights norms and the dominant retributivist perspective of punishment shape the situation of the human right of prisoners against cruel, inhuman, or degrading punishment or treatment in the jail facilities of Cebu City, Mandaue City, and Lapu-lapu City?

With the sub-questions:

- 1.) What is the significance the international human rights norms in the promotion of the human right of prisoners against cruel, inhuman, or degrading punishment or treatment?
- 2.) How does the dominant retributivist perspective of punishment affect the promotion of the human right of prisoners against cruel, inhuman or degrading punishment or treatment, especially in terms of implementation of rehabilitative measures in prison?

First, on what is the significance of international rights norms in the promotion of the human right of prisoners against cruel, inhuman, or degrading punishment or treatment. Its significance is that it is instrumental in mainstreaming the right against cruel, inhuman or degrading punishment or treatment in the domestic legal system in the Philippines which found resonance in principle to prison policy frameworks. This mainstreaming however of the right to humane treatment does not, in actual and concrete terms, translate to the implementation and enforcement of the right. It has been argued that there is an evident lack of receptivity of the right in its entirety in society and a lack of political will on the part of the government to enforce the right. This validates arguments by socio-legal scholars that laws, in and by themselves, are insufficient to address human rights violations.

Second, on how does the dominant retributivist view of punishment affect the promotion of this right. I have posited that there is a tension between the prisoners’ rights for humane treatment and the right of the society to be protected from crimes. In the balance between public anxiety to be secured from criminality and the promotion the prisoners’ right for humane treatment, that balance is unduly tipped in favour of public protection to the detriment of prisoners’ rights. And where society perceives punishment as a way to exact retribution, it can serve to defeat the international and domestic legal norms

emphasizing the rehabilitative purpose of punishment and the promotion of the human right of prisoners against cruel, inhuman or degrading punishment or treatment. And as argued, the incorporation of the international human rights norms into the Philippine domestic legal system did not translate to actual and practical implementation of rehabilitative measures in the prisons. Data reveals this is the reality on the national level, and this has further been reflected in the jails facilities under study.

Finally, my answer to the core question is this: To the extent that in the interaction between international human rights norms and the retributivist view punishment, the latter triumphs, and triumph it did as data in this study suggested, then the recognition and promotion of the human right of prisoners against cruel, inhuman, or degrading punishment or treatment will be a very challenging task. The international human rights norms may have sparked the flame of hope for the recognition and promotion of prisoners' rights but the triumph of retributivism might just well proved to be the greatest obstacle to the enforcement of this right.

The claim that the last few decades have seen the intensification of the so-called 'legalization of culture' or the phenomenon wherein legal rights norms have become the dominant standard of value in many societies and that we are now in an era of a 'global culture of rights' (Hastrup 2003: 16) is nowhere best rebutted than in the case of prisoners' rights. Because no matter how much progress has been made in international standard setting, only actual and concrete implementation on the ground makes the international human rights norms real and meaningful for people.

One more thing this study enunciates is that of the dual nature of punishment as instrument for control and dominance (Foucauldian view) and as expression of an angered social sentiment (Durkheimian view), it is the latter that can provide a more convincing explanation why recognition and promotion of prisoners' rights will remain, to quote Hastrup (2003: 17), 'declared rather than lived'.

For, to repeat a question earlier asked, if punishment is exclusively seen in the utilitarian end-means framework, what value does it have when the ends are hardly ever achieved? And why is it retained despite its failure as manifested in higher crime rate, recidivism, or escalating costs in maintaining prisons (Garland 1990)?

The answer to these questions leads us to Durkheim's thesis. It is because punishment is an expression of an irrational, unthinking emotion by a societal collective whose cherished values have been violated by the criminal. This the very sentiment that feeds how prisoners are to be treated, and treated harshly as a result. To paraphrase Garland (*Ibid.*), this expressive manifestation of social sentiment has resonance in culture. This hostile cultural terrain is the challenge that the international law norms on the human right of prisoners against cruel, inhuman, or degrading punishment or treatment has to confront in order for it to have a more meaningful impact on the prisoners.

Who do we blame then for a culture that is hostile to human rights? Perhaps, there is a need to rethink human rights norms as they are currently framed, holding the state as the sole primary duty-bearer of human rights. For surely society and the individuals create culture and must bear responsibility for

the context they create. It is important to be reminded by what Ackerly (2008: 8) said:

The remoteness of the impact of our habits of daily life, institutions, practices, and global interactions conceal their rights-violating implications. We need tools for revealing these, not definitions of 'rights' and 'duty-bearer' that obscure them.

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Appendices

1. Relevant UDHR Provisions

Article 5, UDHR, states that: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment

2. Relevant ICCPR Provisions

Article 7 of the ICCPR states that: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.'

Article 10 of the ICCPR states that:

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.'

3. Relevant UNCAT Provisions

Article 1 of the UNCAT states that : 'Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'

Article 2 of the UNCAT states that:

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.'

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

4. Relevant Philippine Constitution Provisions

Section 2, Article II of the 1987 Philippine Constitution states that: 'The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.'

Section 19(1), Article III of the 1987 Philippine Constitution states that: 'Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall death penalty be imposed, unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to reclusion perpetua.'

Section 19(2), Article III of the 1987 Philippine Constitution states that: 'The employment of physical, psychological, or degrading punishment against any prisoner or detainee or the use of substandard or inadequate penal facilities under subhuman conditions shall be dealt with by law.'

5. Relevant RA 9745 provisions

Article 3(a) of RA 9745 states that 'torture is an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him/her or a third person information or a confession; punishing him/her for an act he/she or a third person has committed or is suspected of having committed; or intimidating or coercing him/her or a third person; or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a person in authority or agent of a person in authority. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

Article 3 (b) RA 9745 states that: 'other cruel, inhuman and degrading treatment or punishment' refers to a deliberate and aggravated treatment or punishment not enumerated under Section 4 of this Act, inflicted by a person in authority or agent of a person in authority against a person under his/her custody, which attains a level of severity causing suffering, gross humiliation or debasement to the latter.'

6. Respondents' Data on Jail A

Table 1
Jail A Inmates

Respondents R= Remand S=Sentenced	Highest Educa- tional Attain- ment	Dormitory F=Female Dorm M=Male Dorm	Number of Inmates In Respondent's Cell / Size of Cell	No. of Years in Jail	Status of Case	Legal Represe- ntation
Prisoner 1 (R)	High School Graduate	(F)	38 inmates/25 sq.m. (est.)	1 year & 9 months	Prosecu- tion yet to pre- sent evidence	PAO
Prisoner 2 (R)	College graduate	(F)	25 inmates/25 sq.m. (est.)	5 years & 6 months	De- fence's turn for Evi- dence	Private Lawyer
Prisoner 3 (S)	Grade 3 Elemen- tary	(F)	25 inmates/25 sq.m. (est.)	4 years & 5 months	Sen- tenced; for transfer	PAO
Prisoner 4 (R)	Grade 5 Elemen- tary	(M)	35 inmates/74 sq.m.(per rec- ord)	5 years & 1 month	Prosecu- tion's turn for evidence	PAO
Prisoner 5 (R)	2 nd year college	(M)	33 inmates/74 sq.m. (per rec- ord)	6 years & 2 months	De- fence's turn for evidence	PAO
Prisoner 6 (R)	High School Graduate	(M)	30 inmates/74 sq.m. (per rec- ord)	1 year & 1 month	Not yet ar- raigned	PAO

Interviews with the 6 inmates in Jail A were conducted on 24 July 2012.
Interviews with the respective warden of the jail's male and female dormitory
were also conducted on the same date.

7. Respondents' Data on Jail B

Table 2
Jail B Inmates

Respondents R= Remand S=Sentenced	Highest Educa- tional Attain- ment	Dormitory F=Female Dorm M=Male Dorm	Number of Inmates In Respondent's Cell / Size of Cell	No. of Years in Jail	Status of Case	Legal Represen- tation
Prisoner 1 (R)	Grade 3 Elemen- tary	(M)	9 inmates/5.5 sq.m. (per rec- ord)	6 years and 3 months	De- fence's turn for evidence	PAO
Prisoner 2 (R)	Elemen- tary Graduate	(M)	38 inmates/18 sq.m. (per rec- ord)	5 years & 7 months	De- fence's turn for evidence	PAO
Prisoner 3 (R)	High school graduate	(F)	60 inmates/50 sq.m. (per rec- ord)	2 years & 9 months	Prosecu- tion's turn for evidence	PAO
Prisoner 4 (S)	Grade 4 Elemen- tary	(F)	37 inmates/50 sq.m. (per rec- ord)	4 years and 5 months	Prosecu- tion's turn for evidence	PAO

Interviews with the inmates and the male dormitory warden were conducted on 2 August 2012. The warden of the female dormitory was due for transfer, hence was not interviewed.

8. Respondents' Data on Jail C

Table 3
Jail C Inmates

Respondents R= Remand S=Sentenced	Highest Educa- tional Attain- ment	Jail Facility F=Female Dorm M=Male Dorm	Number of Inmates In Respondent's Cell / Size of Cell	No. of Years in Jail	Status of Case	Legal Represen- tation
Prisoner 1 (R)	Grade 6 Elemen- tary	(M)	17 inmates/10 sq.m. (per rec- ord)	4 years & 1 month	Prosecu- tion's turn for evidence	PAO
Prisoner 2 (R)	Grade 2 Elemen- tary	(M)	41 inmates/10 sq.m. (per rec- ord)	6 years & 3 months	Defence's turn for evidence	PAO
Prisoner 3 (S)	Grade 3 Elemen- tary	(F)	29 inmates/113 sq.m. (per rec- ord)	7 years & 1 month	Defence's turn for evidence	PAO
Prisoner 4 (R)	Grade 5 Elemen- tary	(F)	21 inmates/113 sq.m. (per rec- ord)	2 years & 10 months	Prosecu- tion's turn for evidence	PAO
Prisoner 5 (R)	Elemen- tary school graduate	(F)	30 inmates/113 sq.m. (per rec- ord)	5 years & 5 months	Prosecu- tion's turn for evidence	PAO

Interviews with the inmates and the two wardens for both Jail C were conducted on 31 July 2012.

9. Interview Information of other Key Informants

Table 4
Other Key Informants Interview

Person	Institution	Date
CHR lawyer	CHR	23.7.2012
PAO lawyer 1	PAO	01.08.2012
PAO lawyer 2	PAO	01.08.2012
CAPA personnel	CAPA	10.08.2012
Karapatan Staff	Karapatan	14.10.2012